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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 365.

THE ASSOCIATED PRESS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE AMERICAN NEWSPAPER GUILD AS *AMICUS CURIAE*.

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BRIEF ON BEHALF OF THE AMERICAN NEWSPAPER GUILD AS *AMICUS CURIAE*.

Preliminary Statement.

The American Newspaper Guild, a member of The American Federation of Labor, is an organization composed of editorial employees of news publications, press associations and news photo agencies in the United States. It is specifically concerned with protecting its members with respect to hours of labor, wages and working conditions. It desires to negotiate and bargain with employers without fear of reprisals.

That fear of reprisals is not unfounded, was demonstrated by the discharge for organizational activities of Morris Watson, a Guild Vice-president. Watson was with The Associated Press for seven years and had received many commendations for the excellent quality of his work. Indeed, few newspaper men and women can point to a record as complimentary as that set forth concerning Watson in the instant case (R. 183-188, 192-193, 213-216, 247-249).

Upon a resolution by Watson, one of the leaders in the attempt of the newspaper men and women of the country to improve their economic well-being, petitioner's employees had requested an opportunity to talk with their employer about their jobs, particularly their hours of work (R. 230-231). This mildest of human requests, the employer refused (R. 232). The sponsor of the resolution was at once discharged (R. 233).

The Guild, invoking the peaceful machinery of the National Labor Relations Act, filed with the National Labor Relations Board the charges upon which this proceeding is based (R. 234). Although it is technically not a party to the present proceeding, the Guild is unquestionably a real party in interest.

On one side of this controversy is "the greatest clearing house for news in the world," a "union of persons representing more than 1,300 morning, evening and Sunday newspapers" (Bd. Exh. 4, R. 300). On the other side, are the New York editorial workers of this clearing house for news, symbolized by their leader, Morris Watson. The Government, through the National Labor Relations Board, is an administrative agency created to see that contests of this kind are conducted according to the most elementary rules of fair play.

The organized newspaper men and women of the nation are deeply concerned in the result of the proceeding and accordingly file this brief as *amicus curiae* in support of the constitutionality of the National Labor Relations Act.

The Facts.

The uncontroverted testimony at the hearing clearly developed that petitioner, engaged in shipping news over the railroad tracks of the air, is carrying on "commerce among the several states"; that the work of Watson and his fellow editorial workers is carried on in the "current" of such commerce[1]; and that Watson was discriminated against and then discharged solely because of his Guild activities.

A summary of these facts, a detailed analysis of the provisions of the Act and a comprehensive consideration of supporting legal precedents are contained in the Board's brief. We shall not cover the same ground. We shall address ourselves, in the main, to certain impelling aspects of our economic life, as invited by Mr. Justice Brewer:

> "It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources • • •. We take judicial cognizance of all matters of general knowledge." *Muller* v. *Oregon*, 208 U. S. 412, 419, 421.

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[1] No ingenuity is needed to distinguish the flow of news from still unmined coal (*Carter* v. *Carter Coal Co.*, 298 U. S. 238) or chickens slaughtered and ready for sale in local trade (*Schecter Poultry Corp., et al.* v. *U. S.*, 295 U. S. 495). Earlier in these proceedings petitioner urged that the flow of news would be seriously impeded if even a few of its editorial employees were subpoenaed (Bill of Complaint in *Associated Press* v. *Herrick*, 13 F. Supp. 897).

The Questions.

1. Do the words of the Constitution permit Congress to safeguard the free flow of interstate commerce by protecting the rights of employees (including those of petitioner) to organize and bargain collectively, free from the coercive influences of their employer, or do the words of the Constitution compel Congress to stand by powerless to prevent the waste, suffering and blood-shed which, experience has shown, will inevitably follow if the workers of the land may not have a forum to guarantee against unlawful interference with those rights?

2. Do the means selected by Congress to lessen industrial warfare obstructing interstate commerce have a real and substantial relation to the end sought to be attained? Can such means be held to be arbitrary, capricious or unreasonable?

3. Does Congressional action in the premises, as applied to petitioner, violate the guarantee of freedom of the press?

POINT I.

The National Labor Relations Act is a necessary and proper regulation of commerce among the several states.

A Necessary Regulation.

"There will soon come an armed contest between Capital and Labor. They will oppose each other not with words and arguments and ballots, but with shot and shell, gunpowder and cannon."(1)

The United States is in the throes of a second Civil War. Armed strife continues to rock the nation, leaving in its wake lives lost and property devastated. The conclusion that means must be found to resolve the increasing conflicts between employers and employees leaps from the contents of statistical tables.

Strikes have been on the upgrade:

Year	No. of Disputes	No. of Workers Involved	No. of Man Days Lost	Aver. No. of Workers Per Disputes
1931	894	279,299	6,386,183	312
1932	808	242,826	6,462,973	301
1933	1,562	812,137	14,818,846	513
1934	1,856	1,466,695	19,591,949	797(2)

With alarming frequency, the civil authorities have found themselves unable to cope with the rising tide of hostilities. Again and again, armed troops have clashed

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(1) Statement of General Sherman, *quondam* Chief of Staff of the United States Army, made May 1, 1886, reported by Stuart Chase, *Violence in Labor Conflicts* in *American Labor Dynamics in the Light of Post War Developments*, edited by J. B. S. Hardman, (1928) p. 358.

(2) *Labor Fact Book*, prepared by Labor Research Ass'n. (1936) p. 72.

with civilians. During 1933, troops were called out seventeen times in disputes involving thirteen states; by 1934, the figures had expanded dangerously—twenty-four times in nineteen states. And in the year ending June 30, 1935, over 22,000 guardsmen were used on strike duty while only 7,223 were employed for all other purposes.[1] Industries widely disparate in all other respects have suffered similarly.[2]

The struggles have ugly accompaniments. In Georgia during the great textile strike of 1934, National Guardsmen arrested approximately 200 pickets and interned them in concentration camps.[3] Kidnappings of union organizers, tarring and feathering of leaders, forcible deportation from state after state consistently recur.[4] Casualties attend the battles. In the Colorado coal strike (1913-1914) at least 74 persons were killed, including 13 women and children, when militiamen and company guards shot into a strikers' tent colony and set it on fire. Eight years later, wholesale death again resulted from a labor dispute; in the Herrin massacre, 21 unarmed strike breakers were clubbed to death in a riot of strike sympathizers.[5] And the number of

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[1] *Labor Fact Book* at p. 176.

[2] In 1933, troops were called out in strikes of coal miners, farmers, packing company employees, manufacturing workers, milk farmers, textile workers, granite workers and orchard laborers. In 1934, the strikes of miners, maritime workers, textile workers, stove foundry employees, teamsters, shoe workers, electrical company employees and manufacturing laborers necessitated resort to the military. *Id.*, 176-178.

[3] N. Y. Times, Sept. 17-23, 1934; see also Note, *The Use of Military Force in Domestic Disturbances* (1936) 45 Yale L. J. 879.

[4] Witte, *The Government in Labor Disputes* (1932) p. 201. See also *Labor Fact Book*, p. 168, for a general discussion of "Terror in 1935".

[5] Witte, *op. cit. supra*, p. 178.

injuries falling short of death is incalculable. During September, 1920 in Brooklyn alone over 900 people were wounded in the course of almost daily affrays between strikers and nonstrikers.[1]

The costs of waging war are notoriously high. During the ten years from 1916 to 1925, strike losses reached a total of $12,982,048,000 of which $46,000,000 fell on employers, $1,804,000,000 on employees and $10,682,000,000 on the general public.[2] If these figures are compared with the figures showing the cost of projects indispensable to the public welfare, the full extent of the waste becomes appallingly clear. The twelve billion dollars would have been more than enough to pay the salaries of all the teachers in all the public schools of the nation, for the same ten year period; it would have been adequate to pay the entire farm mortgage debt of the United States three times over; no more would have been needed to irrigate all our agricultural lands for more than twelve years.[3] The money estimated to have been spent by one union for one strike—over 14 million dollars[4]—could have paid for one-quarter of the expenditures of all the public libraries in the United States in 1934.[5] These amounts in dollars and cents represent only the direct and immediate losses resulting from labor struggles. The indirect toll in lives, bitterness and

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[1] Olds, *The High Cost of Strikes* (1921) p. 86.

[2] Figures computed by the National Assn. of Manufacturers, and cited by Witte, *op. cit. supra*, at p. 1.

[3] Figures for public expenditures compiled from *The World Almanac* of 1937.

[4] Carver, *The Present Economic Revolution in the United States* (1926) p. 168.

[5] See *supra*, note (3).

decreased efficiency ascribable to increased tension cannot even be reckoned.

> *"The whole delicate structure of modern industry is increasingly intertwined with governmental functions, and will continue to be so in the future, not as a result of any theory whatever, but as the inevitable consequence of the closer integration of social and political life."*[1]

The federal government is vitally concerned with both the recurring skirmishes of industrial warfare and with the waste that they entail. Whatever their cause, their effect is nationwide. The whole integration of modern life is such that an area of local disturbance tends to expand into a general emergency. The discharge of a single individual by the name of Morris Watson may result in a major industrial conflagration. Discontent of textile workers with the conditions under which they labor is not confined to one factory. The textile strike of September 3-22, 1934 spread to 22 states and involved 475,000 employees.[2] For five days, a strike of 400,000 bituminous coal miners has held the entire country in its vise-like grip.[3] Apparently isolated industrial disturbances, such as the strike of longshoremen on the Pacific Coast in 1934, result in a general strike, paralyzing industry and commerce.[4] Although the particular dispute which gives rise to a battle between employer and employee may be totally unrelated to interstate

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[1] Merriam, *Government and Society* in *Recent Social Trends*, Vol. II, p. 1540.

[2] *Labor Fact Book*, p. 81.

[3] *Id.* at pp. 82-83.

[4] *Id.*, pp. 78-80.

commerce, the germ of unrest that it propagates takes no heed of state lines and the contagion is national in scope. The output of goods which would otherwise flow through the channels of interstate commerce is inordinately diminished—interstate movement itself is crippled. It is not the nature of the enterprise, but the nature of the disturbance that is crucial.

That this is so is forcefully demonstrated by the fact that federal troops have been employed in labor disputes entirely irrespective of the source of the dispute. The impotence of the separate states to handle the anarchy arising from labor controversies bears no relation to the question of whether the controversy traces its origins to an interstate or an intrastate enterprise. It is true that the Fort Sumter of the present conflict, the Pullman strike of 1877, involved a railroad,[1] but subsequent encounters in which it was found necessary to resort to federal troops, did not *initially* involve instrumentalities of interstate commerce. Repeatedly, federal troops have moved across state lines to intervene in the crescent struggle between employer and employee. Only a few of the many occasions need be adverted to; the point needs no laboring:

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[1] Witte, *The Government in Labor Disputes* (1932) p. 201.

Date[1]	Dispute	States Affected
1899	Coeur d'Alene strikes in lead and silver mines	Idaho
1903	Colorado mine difficulties	Colorado
1913-1914	Colorado mine difficulties	Colorado
1919	Steel strike	Indiana
1919	Bituminous Coal Strike	West Virginia, Pennsylvania, Tennessee, Wyoming, Utah, New Mexico, Oklahoma, Kansas, and Washington
1919	Seattle General Strike	Washington
1919-1920	Copper Miners' Strike	Montana
1920	Street Car Workers' Strike	Colorado
1921	West Virginia Mine Disturbances	West Virginia[2]

> *"From the foundations of the commonwealth, • • • it follows most obviously that its purpose is not dominion, nor the coercion of men by fear; • • • on the contrary it is that every one may be free from fear, that he may live securely, • • • that he may possess in the best sense his natural right to existence, and to the fruits of his industry. • • • its end is that mind and body may unimpeded perform their functions, that every one may enjoy the free use of his reason, and that hatred, anger, deceit, and strife should cease from among its members."*[3]

When the framers of the Constitution assembled in Philadelphia in 1787, it was their purpose "to form a more perfect union" by removing the sources of economic dis-

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(1) Figures compiled from Senate Document No. 209, 57th Cong., 2d Sess. (1903); Yellen, *Violence in Labor Disputes* (1936); Adamic, *Dynamite* (Rev. ed., 1934).

(2) Federal troops had to intervene in West Virginia on 3 distinct occasions in the two years 1920 and 1921. Witte, *op. cit. supra*, page 178.

(3) Spinoza, *Tractus Theologico-Politicus* (Trübner & Co., London 1862) p. 344.

content which had revealed the Articles of Confederation as an instrument of disunion. During the years preceding the Convention, economic grievances had flared forth in the guise of armed struggles between militiamen and civilians. Federal troops had had to be summoned to subdue Shays and his Coxey's army of debtors,[1] and interminable tariff warfare between the states made impossible anything approximating a free flow of commerce. An interstate commerce convention had been called at Annapolis in 1786 to consider implementing the almost powerless central government but delegates from so few states attended that it broke up without accomplishment. From the failure of this abortive interstate commerce gathering, however, stemmed the call to the Constitutional Convention.[2]

Thus the desire for a strong central control of commerce accounts in large part for the existence of the American Constitution. Mindful of the ills that impelled them to Philadelphia, the framers delegated to Congress the power "to regulate commerce with foreign nations and among the several states." [3] Congress was also given the power to call forth the militia to execute the laws of the Union and to suppress insurrections (Art. I, Sec. 8) and the

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[1] McLaughlin, *The Confederation and the Constitution* (1905), pp. 154-167.

[2] McLaughlin, *id.*, pp. 180-182.

[3] The understanding which the Americans of the Constitutional era had of the powers and duties of the federal government is revealed by their actions at the time. It is not without significance that the outstanding ratification celebration was a victory parade of manufacturers, whose expectations from the national legislature were graphically symbolized by the legend adopted by the calico printers for their float: "May the Union Government protect the Manufacturers of America" (*Pennsylvania Gazette*, July 9, 1788). Their view of the all embracing nature of federal

power, upon application by a state, to protect that state against domestic violence (Art. IV, Sec. 4).

The contention that the Act here challenged transcends the power of Congress raises a question which searches out the fundamental theory underlying our entire governmental system: Is the role which the national government is called upon to play by the Constitution confined solely to intervention after open hostilities in industrial warfare have commenced? Or may it exercise its powers to prevent the necessity of forceful suppression from arising? In terms of the health of the nation, must it wait to intervene until an epidemic of violence and waste has broken out or may it adopt the technique of preventive medicine and prescribe an industrial vaccine?

A Proper Regulation.

> *"Society is under an obligation to provide some alternative to this trial by battle, and to make some remedies available for the civilized appeal to reason, instead of the primitive recourse to arms."*(1)

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power seems to have been shared by Alexander Hamilton, the first Secretary of the Treasury, for in one of his early reports to Congress, he urged the granting of subsidies to individual industrial enterprises, apparently hoping so to promote the general welfare. (Bowers, *Jefferson and Hamilton* (1935), p. 161). Congress, as well, appears to have deemed its power plenary, seriously debating, on grounds of policy, whether to accede to the request of a glass blower named Amelung, who sought a national subsidy for his plant. (2 *Annals of Congress* 1630 (June, 1790).) Layman, lawyer, and legislator alike felt that the Convention had achieved its declared purpose of rendering "the federal constitution adequate to the exigencies of government, and the preservation of the union." *Journals of Congress*, Feb. 21, 1787.

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(1) H. W. Ballantine, *Evolution of Legal Remedies as a Substitute for Violence and Strikes*, in Annals of American Academy of Political and Social Science, Jan. 1917, p. 147.

The federal government, confronted by this omnipresent and ever increasing warfare, soon decided that it could not adequately protect interstate commerce by the use of brute force after the fact. To eradicate evils it is necessary to inquire into and remove their causes. With the rise of collective action on the part of labor, made necessary by the modern industrial system, Congress soon learned, and was again and again reminded, that if anarchy in industrial relations was to end, it was imperative, on the one hand, that workers be encouraged to associate for the advancement of their mutual interests and to bargain collectively through freely chosen representatives and, on the other hand, that employers be induced to refrain from interfering with the organization of labor and to accept and adopt the procedure of collective bargaining.

1895: The Commission to investigate the violent Pullman strike observes:

> "The growth of corporate power and wealth has been the marvel of the past 50 years. It will not be surprising if the marvel of the next 50 years be the advancement of labor to a position of like power and responsibility. We have heretofore encouraged the one and comparatively neglected the other. Does not wisdom demand that each be encouraged to prosper legitimately and to grow into harmonious relations of equal standing and responsibility before the law?"[1]

1902: The Commission of 1898 formed to investigate industrial strife (30 Stat. 476) reports:

> "Most strikes and lockouts would not occur if each party understood exactly the position of the

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[1] *Report on the Chicago Strike of June-July*, 1894, by the United States Strike Commission of 1894-1895 on the Pullman Strike, p. 43.

other. Where representatives of employers and employees can meet personally together and discuss all the considerations on which the wage scale and the conditions of labor should be based, a satisfactory agreement can, in the great majority of instances, be reached. It is not to be supposed that the introduction of joint conferences and arbitration committees in a trade will render strikes and lockouts thereafter impossible. * * * Nevertheless experience both in England and in our own country shows that where these practices have once become fairly well established they greatly reduce the number of strikes and lockouts, and in many trades do away with them altogether for long periods of time. Even when a cessation of employment does intervene, the experience of the beneficial effects of peaceful methods usually leads to their reestablishment."[1]

1903: The Anthracite Coal Commission declares:

"The question of the recognition of the union and of dealing with the mine workers through their union, was considered by both operators and miners to be one of the most important involved in the controversy which culminated in the strike."[2]

The Commission finds that:

"a plan, under which all questions of difference between the employer and his employees, shall first be considered in conference between the employer or his official representative and a committee, chosen by his employees from their own ranks is most likely to

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[1] *Final Report of Industrial Commission* (1902) Vol. 19, pp. 844-845.

[2] *Report of Anthracite Coal Strike Commission* (1903) Senate Doc. No. 6, 58th Cong. Special Sess., p. 61.

produce satisfactory results and harmonious relations, and at such conference the employees should have the right to call to their assistance such representatives or agents as they may chose, and to have them recognized as such."[1]

1916: The Commission on Industrial Relations states:

"The fundamental question for the Nation to decide, for in the end public opinion will control here as elsewhere, is whether the workers shall have an effective means of adjusting their grievances, improving their condition, and securing their liberty, through negotiation with their employers, or whether they shall be driven by necessity and oppression to the extreme of revolt. Where men are well organized, and the power of employers and employees is fairly well balanced, agreements are nearly always reached by negotiations".

The Commission concludes:

"As a result, therefore, not only of fundamental considerations but of practical investigations, it would appear that every means should be used to extend and strengthen organizations throughout the entire industrial field."[2]

1920: The Industrial Conference convened by President Wilson to consider the causes of industrial unrest and to advise methods of solution reports:

"Employees need an established channel of expression and an opportunity for responsible con-

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[1] *Report of Anthracite Coal Strike Commission* (1903) Senate Doc. No. 6, 58th Cong., Special Sess., p. 62.

[2] *Final Report of Commission of Industrial Relations* (1916) Senate Doc. No. 415, 64th Cong., 1st Sess., Vol. 1, pp. 64-68.

> sultation on matters which affect them in their relations with their employers and their work. . . . Representatives must be selected by the employees with absolute freedom. . . . All employees must feel absolutely convinced that the management will not discriminate against them in any way because of activities in connection with shop committees."[1]

Knowing these things, knowing that the denial by employers of the right of employees to organize and the refusal by employers to accept the system of collective bargaining, has been one of the major causes of strikes stultifying commerce[2] and has been largely responsible for the havoc and chaos in industrial relations, Congress has made constant efforts to protect the right of employees to organize themselves for collective action.

The attempts of the federal government to adjust differences and reduce hostilities in the fundamental conflict between labor and capital for a fair division of the wealth have been many and varied.[3] The Secretary of Labor was given power to act as mediator in labor disputes.[4] Attempts were made to fix the actual terms of the employment contract.[5] Efforts were exerted to have disputants

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[1] *Report of Industrial Conference*, 1920, pp. 9-11.

[2] An analysis of strikes and lockouts in the United States classified by major issues involved is contained in Bulletin No. 1 of the National Labor Relations Board, Division of Economic Research, August, 1936, pp. 105-106. See also Table appended to brief for the National Labor Relations Board in the instant case (p. 144).

[3] An excellent history of intervention by the federal government in labor relations and labor disputes is contained in Bulletin No. 1 of the National Labor Relations Board, Division of Economic Research, August, 1936, pp. 33-50.

[4] 37 Stat. 738.

[5] See *Wilson* v. *New*, 243 U. S. 332.

accept the awards of a Labor Board which had behind it only the sanction of public opinion.[1] A National Labor Board, which acted as a mediation and fact finding agency, was created.[2] None of these methods worked.

Notably successful in the field of labor disputes, however, was the National War Labor Board. With the endorsement of a united country, the Board enunciated the policy that "the right of workers to organize into trade unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged or interfered with by the employers in any manner whatsoever."[3] The soundness of this policy was demonstrated by the outstanding accomplishments of the Board.[4] After a period of experimentation in the field of railroad labor disputes,[5] the Railway Labor Act was adopted.[6] Interference with organizational activities of employees was enjoined and collective bargaining with freely chosen representatives of a majority of any class of

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[1] Title III, Transportation Act of 1920, 41 Stat. 456.

[2] This Board was created under the National Industrial Recovery Act (48 Stat. 198) to handle labor disputes arising under the codes.

[3] *National War Labor Board, Principles and Rules of Procedure* (1919), p. 4.

[4] See Watkin, *Labor Problems and Labor Administration in the United States during the World War*, University of Illinois Studies in the Social Sciences, Vol. VIII, No. 3.

[5] See Witte, *The Government in Labor Disputes* (1932), pp. 238-245; *Labor and the Government*, Twentieth Century Fund (1935) pp. 173 *et seq.*

[6] 44 Stat. 577, as amended by 48 Stat. 1185.

employees required. Interstate commerce is no longer strangled by national railroad strikes.[1]

In 1935, Congress, reviewing and summarizing the lessons of history, found:

> "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce" (National Labor Relations Act, Sec. 1).

Examining its previous attempts to eliminate trial by battle in industrial affairs, Congress concluded:

> "Experience has proved that protection by law of the rights of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees" (*ibid.*).

To protect these rights of employees and thus to insure a free and unimpeded flow of commerce among the states,

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[1] See First and Second *Annual Reports* of National Mediation Board. A summary account of the excellent conditions prevailing in those industries in which the procedure of collective bargaining has been adopted is contained in Bulletin No. 1 of the National Labor Relations Board Division of Economic Research, August, 1936, pp. 17-31.

Congress provided the machinery of the National Labor Relations Act for the amicable, speedy and impartial adjustment of labor disputes. A distinct product of trial and error, resting on a sound pragmatic and empirical basis, the act contains no novel philosophy, no strange economic theory, no *a priori* principles.

Thirty-five years ago the Industrial Commission issued a national warning:

> "If the working people are prevented from introducing an element of democracy into industrial life by way of labor organizations, they will undertake to introduce it in another way."[1]

The National Labor Relations Act recognizes the truth, so painfully and expensively taught, that only by economic democracy can economic peace be attained.

POINT II.

The National Labor Relations Act does not deprive any person of life, liberty or property without due process of law.

> "The inquiry must be whether considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."[2]

There can be no doubt but that the impact of industrial warfare on interstate commerce necessitated Congressional action if the channels of that commerce were to be free of

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[1] *Final Report of the Industrial Commission* (1902), Vol. 19, p. 805.

[2] *Purity Extract & T. Co.* v. *Lynch*, 226 U. S. 192, 204 (1912).

increasing obstructions. Thus, the end of the National Labor Relations Act is within the competence of Congress to attain. And it is clear that the means selected by Congress have a real and substantial relation to this legitimate object.

In terms of the current constitutional test of what constitutes "due process of law"[1] one question remains: Are the means arbitrary, capricious and unreasonable?

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[1] There is little doubt that as used in the Fifth Amendment, the phrase "due process of law" was understood to mean process in the sense of legal procedure, was "intended to convey the same meaning as the words 'by the law of the land' in Magna Charta." (*Den* v. *Hoboken Land & Improvement Co.*, 18 How. 277 (1855).) And, both as to the Fifth and the Fourteenth Amendments, it was so interpreted by this court.

> "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. . . .
>
> "But, however, this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that where by the laws of the State

It has been shown that rational grounds support the legislative determination which is embodied in the Act. These rational grounds commended themselves to the overwhelming majority of the law makers who passed upon the Act.

63 senators, of whom 47 were lawyers, voted in favor of the bill, while only 12 senators, of whom 7 were lawyers, voted against it.[1] This Senate vote, translated, shows an overwhelming popular majority in favor of the Act:

90,476,084—for
8,295,115—against
22,712,162—not voting.

The House of Representatives, containing at least 265 lawyers (61%), passed the bill without a record vote.[2] In neither body of Congress was any constitutional objection

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the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law." (*Davidson* v. *Board of Admrs. of New Orleans*, 96 U. S. 97 (1877).

To be sure, for approximately a half a century, the words "due process of law" have been applied to effect substantive as well as procedural rights. Yet, it must be clear that the present construction of this phrase bears slight resemblance to that initially accorded it.

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[1] Congressional Record, 74th Cong., 1st Sess., Vol. 7, Part 7, p. 7681; Congressional Digest, 74th Cong., 1st Sess. The bill was favorably reported by the Senate Committee on Education and Labor (Senate Report No. 573, 74th Cong., 1st Sess.), 8 of the 22 members of which were lawyers (Congressional Digest, *supra*).

[2] *New York Times*, June 20, 1935, page 1; Congressional Digest, *id.* The bill was favorably reported by the House Committee on Labor (H. Rep., No. 1147, 74th Cong., 1st Sess.), 6 of the 12 members of which were lawyers (Congressional Digest, *supra*).

to the statute urged. See *Old Dearborn Distrib. Co.* v. *Seagram-Distillers Corp.*, 81 L. Ed. 130, 134 (1937).

There is thus a great preponderance of opinion—lay and legal—which may be adduced in support of the proposition that the Act is neither arbitrary nor capricious. To hold it repugnant to the Fifth Amendment would be to declare that these hundreds of law makers and millions of citizens lacked any rational basis for what was undubitably their considered judgment.[1] Their opinion, without more, would seem sufficient proof that the statute is not arbitrary and capricious beyond a reasonable doubt. And that all doubts must be resolved in favor of the validity of legislation is a fundamental canon of constitutional construction.[2]

> *"The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed * * * Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.*[3]

Congress has found that, in the public interest, it is essential to enforce freedom of association for the purpose of negotiating the terms upon which labor is willing to sell its services to the end that there may be peace instead of war in matters affecting interstate commerce. It has declared that employees shall have the right to "self organ-

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[1] The Act was extensively considered by Congress for two years. See brief of National Labor Relations Board in the instant case, page 69, note 32.

[2] *McCullough* v. *Maryland*, 4 Wheat. 316, 421 (1819); *Sweet* v. *Rechel*, 159 U. S. 380, 392 (1895).

[3] *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570.

ization, to form, join or assist labor organizations * * * and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (Sec. 7).

The protection of these rights is not a new or unusual principle but one which has been developed by experience, statute and decision over a long period of years. The Act merely gives further legislative recognition to the principle that employees have a right entitled to judicial protection in being able to act or to have a representative act for them free from the coercive influences of an employer.

The Act declares that it shall be an unfair labor practice for an employer "by discrimination with regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization" [Sec. 8(3)] and provides that the Board may order an employer "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act" [Sec. 10(c)].

This is wholly logical and reasonable. To be subject to discharge because of self-organization activity is to be entirely deprived of the right of self-organization. Of what conceivable use is the right to act collectively if the attempted assertion of that right can be ruthlessly crushed at the start? If employees have the right to organize and designate representatives and to bargain collectively, then obviously the employer is under a correlative duty to refrain from interfering with or restraining or coercing employees in the exercise of such right. The economic power of the employer is conditioned so that it does not impinge on the recognized right of the employee. This

restriction on the employer in no way curtails the normal exercise of his power to hire or fire—the employee may be discharged for any other reason, however capricious—but is merely directed at its abuse for the purpose of interfering with collective action.

Reinstatement, with back pay, of an employee discharged in violation of a law, must be required if the law is to have any meaning. Surely, its editorial employees are as much entitled to protection against the unfair labor practices of the petitioner as the petitioner is entitled to protection against the unfair trade practices of a competitor.[1] In each case, there is a property interest involved. *Texas & New Orleans Rd. Co.* v. *Brotherhood*, 281 U. S. 548, and *Associated Press* v. *International News*, 248 U. S. 215.

POINT III.

The National Labor Relations Act as applied to petitioner does not abridge the freedom of the press.

Petitioner concedes, as of course, it must, that the Act contains no restrictions whatever on its freedom to publish what it pleases free from Government blue-penciling or previous Government permission. See *Patterson* v. *Colorado*, 205 U. S. 454; *Near* v. *Minnesota*, 283 U. S. 697. However, petitioner contends, Watson has exhibited a prejudice

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[1] In 1916 the Commission on Industrial Relations recommended that the Federal Trade Commission in determining unfair methods of competition "specifically investigate the unfair treatment of labor in all respects, with particular reference to the following points: (a) Refusal to permit employees to become members of labor organizations; (b) Refusal to meet or confer with the authorized representatives of employees." Report of Commission of Industrial Relations (1916) Senate Doc. No. 415, 64th Cong., 1st Sess., Vol. 1, p. 68.

in favor of the rights of labor. If Watson is reemployed, those prejudices will filter into the news, for the author and the product are "one and inseparable" (Brief, p. 102). Since "freedom of expression must be jealously protected" (Brief, p. 100), Congress is impotent to prevent industrial disturbances in the newspaper industry.

This argument confuses freedom of the press with integrity of the news. The Constitution does not guarantee the objectivity of the press, nor is objectivity attainable in a subjective world. The question really raised by petitioner is not whether news shall be unprejudiced but rather whose prejudices shall color the news. And it should be noted that petitioner, under the Act, as before, remains the complete master of its business. Its prejudices are still supreme. Under the Act, as before, petitioner may, in its news releases, give full play to its declared prejudice against the organization of workers for the betterment of their living standards. Moreover, petitioner is still in undisputed possession of the ultimate blue pencil. If an employee exhibits a bias in reporting news events which is distasteful to petitioner, petitioner may reject his work, may alter it or may discharge the offending employee. The privilege which petitioner demands "to print the news it wants to as it wants to" (Pet. for Certiorari, p. 19) remains wholly unimpaired.

Further, it should be observed, that Watson was actively associated with the Guild for two years prior to his discharge. It was not and could not be suggested that there was any bias in his handling of the news. The charter of the Guild, of which Watson was one of the founders, states that it is the purpose of the Guild *inter alia*, "to raise the standards of journalism by promoting

accuracy, thoroughness, and impartiality in reporting, writing and editing news" (Bd. Ex. 20, R. 451). A majority of the editorial employees in petitioner's New York office are Guild members (R. 239). To whom can petitioner point and accuse of bias in the treatment of news?

Far from violating the guarantee of freedom of the press, the National Labor Relations Act attempts to remove a significant barrier to the free circulation of facts and opinions. Conflicts between newspaper employers and newspaper employees have repeatedly threatened the very existence of large parts of the press.[1] They have precipitated newspapers into receiverships;[2] they have caused newspaper plants to be shut down for extensive periods.[3] And it cannot be doubted that interruption of the operations of press associations would seriously affect virtually every newspaper in the land. A glance at any morning newspaper will demonstrate forcibly how little front-page news would remain if press association items were removed (See Guild Exhibits 1-10, R. 416).

Non-action of a governmental agency may be far more destructive of a fundamental guarantee than positive legis-

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[1] Bd. Exh. 13 (R. 341) lists the strikes and lockouts in the newspaper industry in 1934 and January to July, 1935.

[2] Strikes of editorial employees on the *Newark Ledger* and the *Amsterdam News* caused by a refusal of the employers to bargain collectively, forced these newspapers into receivership (R. 261-263).

[3] To cite a recent instance: the strike of editorial employees against the *Seattle Post-Intelligencer*, caused by interference with organizational activities, forced suspension of publication of the paper (for the first time in sixty years) from August 13, 1936 to November 30, 1936. *The Guild Reporter*, Dec. 1, 1936, p. 1. A boycott against and refusal of transportation workers to handle other Hearst publications definitely interfered with interstate commerce. *Ibid.*, Sept. 15, 1936, p. 4.

lation. Congress is forbidden to abridge the freedom of the press. It is not commanded to remain inert before an evil which threatens of itself to nullify that freedom. Steps taken to assure a flow of news unimpeded by strikes and lock-outs with their concomitant violence and disruption cannot be held repugnant to a constitutional mandate designed to assure that free transmission of facts and ideas in which liberty of thought begins.

Conclusion.

The order of the court below should be affirmed.

February 4, 1937.

Respectfully submitted,

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